Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

TERENCE LOOSE, AS TRUSTEE OF THE WILLIAM LOOSE FAMILY TRUST, *Petitioner*,

v

EMIL CADKIN, ET AL., *Respondents*,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether civil defendants must obtain a final preclusive judgment establishing immunity from future federal lawsuits in order to be considered prevailing parties for purposes of an award of attorney's fees under Section 505 of the Copyright Act or are defendants who obtain favorable interim judicial orders and court-ordered dismissal of copyright claims in the pending lawsuit eligible for prevailing party status? Put another way, must defendants categorically obtain final judgment on the merits or can prevailing party status be conferred within the meaning of *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), when defendants obtain judicially sanctioned interim relief in an action subsequently rendered moot by plaintiff's voluntary dismissal?

LIST OF PARTIES

Petitioner is Terence Loose, in his capacity as Trustee of the William Loose Trust, erroneously named as the William Loose Family Trust

Respondents are Emil Cadkin, as an individual, and Lila Cadkin, as Trustee of the Cadkin Trust.

Irma Loose, an individual, and May-Loo Music, Inc., a California corporation were appellees in the proceedings below but are not parties here

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OPINIONS BELOW

The court of appeals' opinion is reported at 569 F.3d 1142. Pet. App. 1a. The district court's order awarding attorney's fees (Pet. App. 27a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on June 26, 2009. Rehearing was denied on September 15, 2009. On December 7, 2009, Justice Anthony Kennedy extended the time to file the petition for writ of certiorari until January 18, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 505 of the Copyright Act provides:

> In any civil action under the title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505.

STATEMENT OF THE CASE

In *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), this Court articulated the test for determining when a litigant qualifies as a prevailing party under certain federal fee-shifting statutes. Under *Buckhannon*, the inquiry for determining the prevailing party requires an examination of whether the party seeking fees has experienced a judicially sanctioned material alteration in the legal relationship of the parties in the lawsuit. *See id.* at 605. The question is whether the prevailing party obtained some court-ordered relief on the merits materially altering the parties' legal relationship. While a voluntary change outside the litigation lacks the necessary judicial imprimatur to confer prevailing party status, and a favorable final judgment on the merits is sufficient to confer such status, this Court has never held that a prevailing defendant must obtain final preclusive judgment on the merits before prevailing party status can be conferred.

Several circuit courts of appeals have rejected a *per se* rule that judgment on the merits is categorically required to establish prevailing party status under federal fee-shifting statutes. In awarding fees to plaintiffs, the courts of appeals, including the Ninth Circuit, generally confer prevailing party status when plaintiff obtains preliminary interim relief, even if plaintiff ultimately does not succeed on the merits of its claim, or the underlying claims are subsequently rendered moot. In *Sole v. Wyner*, 551 U.S. 74 (2007), this Court recently left open the possibility that absent

a final decision on the merits, interim success on preliminary injunction may warrant an award of fees.

The question presented here is whether defendants can achieve prevailing party status absent a final preclusive judgment in the pending lawsuit or, instead, whether they must obtain a favorable adjudication on the merits of plaintiff's claims sufficient to achieve preclusive effect in future federal court litigation. Put another way, must prevailing defendants establish, categorically, *immunity from future suit*, regardless of whether they obtain a substantial degree of court-ordered relief in the pending action, or can plaintiff unilaterally preclude a fee award and nullify the judicial imprimatur by subsequently voluntarily dismissing the action. In categorically requiring prevailing defendants to obtain a preclusive judgment, while conferring the same status on plaintiffs who achieve interim relief, the Ninth Circuit's rule contravenes this Court's mandate in *Buckhannon*, imposes a disparate double standard and creates a doctrinal split among the circuit courts.

Petitioner Terence Loose, as Trustee for the William Loose Family Trust, seeks review of the Ninth Circuit's decision reversing the district court's $288,726.20 award of attorney's fees under § 505 of the Copyright Act. After four years of litigation, three orders of dismissal, an abandonment of all remaining federal claims and an impending order of dismissal with prejudice, the district court found Respondents' copyright claims were objectively unreasonable, denied a request for remand, deemed Petitioner prevailing party and awarded fees. After the tentative order of

dismissal with prejudice issued, Respondents, Emil Cadkin and Lila Cadkin, as Trustee of the Cadkin Trust, voluntarily dismissed their federal action and re-filed their state law claims in superior court. The Ninth Circuit reversed the award of fees, overruling *sua sponte* its 68-year-old decision in *Corcoran v. Columbia Broadcasting, Inc.*, 121 F.2d 575 (9th Cir. 1941), and holding that, under *Buckhannon*, defendants are not prevailing parties absent a judicially preclusive judgment foreclosing future federal court actions. "Because the plaintiffs in this lawsuit remained free to refile their copyright claims against the defendants in federal court following their voluntary dismissal, . . defendants are not prevailing parties." Pet. App. 4a.

I. Factual Background[1]

From about 1959 until the 1970s, Emil Cadkin, sometimes solely and sometimes with composer William Loose, created and recorded thousands of music cues – short musical works used in television and film. Pet. App. 39a. Some of these cues were administered by GRH Music ("GRH"), owned by Cadkin and Loose. In the 1960s, Cadkin authorized Loose to license these music cues to third parties. *Id.* Emil Cadkin formed the Cadkin Trust for his share of the copyright interest, and appointed his wife, Lila Cadkin, as Trustee.

William Loose formed May-Loo Music, Inc. to license the music he composed and controlled, including the works he co-authored with Cadkin. Pet. App. 5a.

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[1] The facts stated here are as recited in the opinions below.

The licensing proceeds were split between Loose's wife, Irma Loose, and the William Loose Family Trust. Terence Loose, William's son, was appointed Trustee.

In October 2003, Emil Cadkin and Lila Cadkin, as Trustee of the Cadkin Trust (the "Cadkins"), filed an action in federal district court against Terence Loose, as Trustee of the William Loose Family Trust (the "Trust"), and Irma Loose and May-Loo Music, Inc. (collectively, "May-Loo"). The Cadkins alleged that William Loose removed Emil Cadkin's name as author and GRH's name as publisher from works Cadkin composed or co-composed with Loose, and incorporated those cues into the May-Loo music library, thereby crediting William Loose as the sole composer and depriving the Cadkins of their half of the royalty share. Pet. App. 5a. The Cadkins alleged that May-Loo and the Trust continued to license and profit from the works after William Loose died, and that they concealed their fraudulent action until within three years of the Cadkins' complaint. Pet. App. 39a.

The Cadkins' complaint, brought more than 40 years after GRH was formed, implicated over 5000 music cues, alleged William Loose registered the works with the U.S. Copyright Office, and asserted multiple claims for relief, including damages, for copyright infringement, fraud, statutory and common law unfair competition, false designation of origin (trademark) and various California state law claims. Pet. App. 5a-6a.

In February 2007, after extended settlement discussions proved fruitless, the Trust and May-Loo filed motions to dismiss, which were granted in part.

The district court found, *inter alia*, that the state law claims were preempted by the Copyright Act, dismissing them without prejudice, that the fraud claims were not alleged with sufficient particularity, dismissing them without prejudice, and directed the Cadkins to join necessary parties. Pet. App. 48a-61a.

The Cadkins filed a first amended complaint, which contained three claims for relief: (1) copyright infringement; (2) false designation of origin (trademark); and (3) declaratory relief. Pet. App. 6a. The Trust and May-Loo again moved to dismiss. In May 2007, the district court granted the motions with leave to amend, noting that the Cadkins' "opposition makes no legal argument, whatever, and fails to cite to a single source of legal authority." Pet. App. 46a. The first amended complaint was dismissed for failure to allege sufficient facts; failure to plead fraud with specificity; failure to state a claim for copyright infringement; failure to state a claim for false designation of origin; and, failure to state a claim for declaratory relief. *Id.* The dismissal admonished that, should they choose to amend, the Cadkins "shall provide specific identifying information as to the music at issue," including detailed allegations of ownership, registration, fraud and infringement. Pet. App. 47a.

In response, the Cadkins lodged a proposed second amended complaint and moved the district court to remand the proceedings to state court. Pet. App. 6a. The motion admitted that "none of the parties herein may own the rights in any musical composition at issue," (*Id.*), and asserted that the "improprieties [which Cadkin has unearthed] are better resolved in

state court." Pet. App. 43a. In July 2007, the district court denied the motion to remand, explaining that remand was not possible when the case had been initiated in federal court. Pet. App. 44a. Even so, the Cadkins pressed on with the federal action.

Thereafter, the district court and the parties treated the second amended complaint as the operative pleading. Pet. App. 7a. The Cadkins omitted from the amended complaint the previously dismissed copyright infringement claims, and all other federal law claims. The second amended complaint instead contained strictly state law claims: declaratory judgment, unjust enrichment and accounting for profits. Pet. App. 7a.

In September 2007, the Trust and May-Loo moved to dismiss, arguing that the second amended complaint should be dismissed with prejudice because (1) all three state law claims were preempted by the Copyright Act, (2) the factual allegations (still) lacked the requisite specificity and (3) any federal copyright infringement or trademark claims were waived for the Cadkins' failure to include them in the second amended complaint. Pet. App. 7a.

On September 17, 2007, the district court issued its tentative ruling to dismiss the second amended complaint without leave to amend. In its tentative ruling, the district court deemed the Cadkins' failure to oppose as consent to dismissal, found the state law claims were preempted by the Copyright Act, and concluded, as an independent ground for dismissal, that the Cadkins failed to comply with the court's prior directive to plead the fraud claims with the requisite specificity. Pet. App. 38a-42a. The district court

further determined that the copyright claim was previously abandoned and thus could not be reasserted in the second amended complaint. Pet. App. 42a.

The district court deferred its final ruling however, taking the matter under submission to consider an intervening request for voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1), which the Cadkins had recently lodged. Pet. App. 36a-37a. The form notice, which sought dismissal of the action in its entirety, did not indicate whether the dismissal was with prejudice, or without. Pet App. 14a.

The Cadkins' voluntary dismissal was entered without comment in October 2007. Pet. App. 7a.

In December 2007, the Trust and May-Loo moved for an award of attorney's fees and costs pursuant to Section 505 of the Copyright Act, in the amounts of $225,575 and $63,151.20, respectively. Pet. App. 28a. The district court granted the motions and awarded the full amounts requested, finding the Trust and May-Loo were prevailing parties for purposes of Section 505, and within the meaning of this Court's decision in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994). The district court relied on longstanding Ninth Circuit precedent which provided that where "defendant has been put to the expense of making an appearance and of obtaining an order for the clarification of the complaint, and the plaintiff then voluntarily dismisses without amending the pleading, the party sued is the prevailing party." *Corcoran v. Columbia Broadcasting Sys., Inc.*, 121 F.2d 575, 576 (9th Cir. 1941). The district court noted that defendants brought five motions to dismiss and that

the Cadkins voluntarily dismissed their action on October 4, 2007, after the motion to dismiss the second amended complaint was filed and served and after the parties appeared for oral argument. Pet. App. 29a. In light of the subsequent voluntary dismissal, the court ultimately found the motion to dismiss was moot. *Id.*

In applying the *Fogerty* factors and exercising its discretion to award fees, the district court found the Cadkins' claims were objectively unreasonable and frivolous, and that a fee award would deter similarly unreasonable and frivolous future claims. Noting Emil Cadkin's judicial admission that he "does not own copyrights to any of the musical pieces at issue," and that the copyright "allegations have never been substantiated any evidence," the district court found the claims objectively unreasonable and unsupported by law or fact. Pet. App. 30a. The court further noted that it had previously rejected as objectively unreasonable Emil Cadkin's contention that he composed the cues at issue in a related litigation from 2003. According to the court, "[g]iven that Cadkin has provided no evidence that he was the copyright owner for any of the musical works at issue and now as much as admits that he is not the owner, the Court finds that the claims pled were frivolous." Pet. App. 31a.

In February 2008, the district court denied the Cadkins' motion for reconsideration, again noting Emil Cadkin's judicial admission on the record "that he does not own copyrights to any of the musical pieces at issue." Pet. App. 24a. Recognizing that Emil Cadkin "is only entitled to recovery under the Copyright Act if he owns copyrights to the works at issue," the district

court refused to reconsider its order, which was "based on Cadkin's admission that he is not and was never entitled to recovery based on his allegations." Pet. App. 24a-25a. Rejecting the assertion that the Cadkins' ability to bring their claims in a state court action rendered such claims objectively reasonable, the district court stated that whether or not the state law claims are preempted by federal copyright law, it is irrelevant since the court awarded "attorney's fees and costs incurred in connection with Cadkin's protracted federal court action, based on a federal copyright claim that he has admitted had no factual or legal basis." *Id.*

II. The Ninth Circuit's Opinion Below

The Ninth Circuit reversed, overruling *sua sponte* its decision in *Corcoran* as "clearly irreconcilable" with this Court's decision in *Buckhannon*, and finding defendants were not prevailing parties. Pet. App. 11a. Finding *Buckhannon's* material alteration test applies with equal force to the prevailing party fee provision in Section 505, the Ninth Circuit extended *Oscar v. Alaska Dep't of Educ. & Early Devel.*, 541 F.3d 978 (9th Cir. 2008), where it held that because "'a dismissal without prejudice is not a decision on the merits' and plaintiff was free to re-file his complaint in federal court, 'dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing.'" Pet. App. 12a (quoting *Oscar*, 541 F.3d at 981). The Ninth Circuit distinguished its decision in *Miles v. California*, 320 F.3d 986 (9th Cir. 2003), which applied *Buckhannon* to

confer prevailing party status on defendant where plaintiff's voluntary dismissal without prejudice to seek relief in state court changed the legal relationship between the parties because it "'eliminate[d] the federal ADA claim from further proceedings in federal court.'" Pet. App. 13a (quoting, *Miles*, 320 F.3d at 989).

Applying *Oscar* and *Miles* to the case at hand, the Ninth Circuit found that the Cadkins' voluntary dismissal, though not expressly with prejudice, was necessarily without prejudice because it was their first. Accordingly, and notwithstanding the district court's prior orders of dismissal or its substantive rulings on the binding nature of Emil Cadkin's judicial admissions, the Ninth Circuit held that the Cadkins' subsequent voluntary dismissal failed to alter the legal relationship of the parties because the defendants remain subject to the risk of re-filing. Pet. App. 17a.

The Ninth Circuit rejected the contention that the Cadkins' abandonment of the copyright claims (indeed, of all federal claims) in the second amended complaint altered the relationship between the parties because the intentional waiver functioned as a dismissal with prejudice as to the copyright claim. Although the Ninth Circuit has consistently held that "'all causes of action alleged in an original complaint which are not alleged in an amended complaint are waived,'" the court refused to apply the waiver rule to a new lawsuit after a voluntary dismissal without prejudice. Pet. App. 15a (quoting *Marx v. Loral Corp.*, 87 F.3d 1049, 1055 (9th Cir 1996)). Relying on a decision in which the Ninth Circuit refused to carry over to a new action a state's waiver of its sovereign of

immunity in a prior action, the court characterized Fed. R. Civ. P. 41(a) as a categorical rule that "'disallows the "carry-over" of any waiver from a voluntarily dismissed action,'" and under which such dismissals leave the situation "'as if the action had never been [filed].'" Pet. App. 16a (quoting *City of S. Pasadena v. Mineta*, 284 F.3d 1154, 1157 (9th Cir. 2002)).

The Ninth Circuit rejected the contention that the district court's prior dismissals of the copyright claims were sufficient to confer prevailing party status despite the Cadkins' subsequent voluntary dismissal, and refused to extend the reasoning of its decision in *Watson v. County of Riverside*, 300 F.3d 1092, 1093 (9th Cir. 2002). Pet. App. 16a. In *Watson*, prevailing party status was conferred on a plaintiff who obtained interim preliminary injunctive relief, but whose claim for permanent injunctive relief was rendered moot before final judgment was entered. *Watson* stated the Ninth Circuit's rule for plaintiffs: "Having succeeded in winning a preliminary injunction that prevented the use of his report at the hearing, [plaintiff] obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit." *Id.* at 1096. That change in the employer's behavior, according to the Ninth Circuit, though temporary and ultimately rendered moot, "'carrie[d] all the "judicial imprimatur" necessary to satisfy *Buckhannon*.'" Pet. App. 17a (quoting *Watson*, 300 F.3d at 1096 and citing *Buckhannon*, 532 U.S. at 603 ("'a prevailing party' is one who has been awarded some relief by the court'")).

The Ninth Circuit refused to apply *Watson's* reasoning to confer prevailing party status on

defendants who obtain interim court-ordered relief, which is subsequently rendered moot by plaintiff's voluntary actions Notwithstanding that the Trust obtained court-ordered relief in the pending lawsuit, the Ninth Circuit required a preclusive judgment on the merits sufficient to foreclose future federal actions. Despite the district court's prior dismissals, impending order of dismissal with prejudice, and findings of objective unreasonableness, abandonment of federal claims and judicial admissions, the Ninth Circuit held that defendants are not prevailing parties under *Buckhannon* where, by virtue of a voluntary dismissal without prejudice, plaintiffs "have not been deprived of the ability to seek relief in federal court." Pet. App. 17a. The Ninth Circuit held, categorically: "[A] defendant is a prevailing party following dismissal of a claim if the plaintiff is judicially precluded from refiling the claim against the defendant in federal court." *Id.*

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's *per se* rule that defendants must establish immunity from future suit in order to qualify as prevailing parties under federal law at once unduly restricts and contravenes this Court's decision in *Buckhannon*. Under the Ninth Circuit's rule, unlike plaintiffs who can be deemed prevailing parties upon obtaining interim relief, defendants must obtain a final judgment that precludes re-litigation of the same claim before prevailing party status will be conferred, notwithstanding any interim alteration in the legal relationship during the course of the pending action.

The Ninth Circuit's blanket rule contravenes *Buckhannon*, which does not expressly limit cognizable relief to final preclusive judgments on the merits, or contemplate disparate standards for civil defendants.

Buckhannon establishes a rule that confers prevailing party status upon a judicially sanctioned material alteration in the parties' relationship in the pending action, and expressly rejects a rule that would condition prevailing party status on one party's extra-judicial voluntary act. While this Court has recently declined to decide whether temporary relief absent final judgment is sufficient to warrant an award of fees to plaintiff, it has never held that final preclusive judgment is necessary for defendant, or plaintiff, before prevailing party status can be conferred. The pertinent question under *Buckhannon* is whether there is a material alteration in the parties' relationship in the pending action, not whether plaintiff is forever barred from litigating. Even so, dismissal carries consequences in subsequent suits, where claims are abandoned, judicially conceded or statutorily barred.

The Ninth Circuit's categorical rule requiring immunity from future suit creates a double standard for defendants, and cannot be reconciled with other circuits, which routinely confer prevailing party status on plaintiffs who obtain non-preclusive interim relief. This new rule applies with equal force to all claims arising under analogous federal fee-shifting statutes and thus affects a vast array of federal court litigants. Review is warranted to clarify whether preclusive judgment is required under *Buckhannon* and, if so, whether plaintiffs must obtain equal relief to prevail.

I. THE NINTH CIRCUIT'S *PER SE* RULE REQUIRING DEFENDANTS TO ESTABLISH IMMUNITY FROM FUTURE LITIGATION, REGARDLESS OF INTERIM JUDICIAL RELIEF, CONTRAVENES THE DECISIONS OF THIS COURT

In *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), this Court articulated the test for determining when a litigant qualifies as a prevailing party under certain federal fee-shifting statutes. Under *Buckhannon*, the inquiry for determining the prevailing party requires an examination of whether the party seeking fees has experienced a judicially sanctioned material alteration in the legal relationship of the parties in the lawsuit. *See id.* at 605. This Court considered whether a plaintiff who has failed to secure a final judgment on the merits or a court-ordered consent decree, but has nevertheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct, can be deemed a prevailing party for purposes of warranting a fee award. In rejecting the "catalyst theory" for determining prevailing party fee awards, this Court distinguished court-ordered or judicially sanctioned relief from favorable outcomes that result from a voluntary, extra-judicial change in defendant's conduct This Court cited final judgments on the merits and court-ordered consent decrees as examples of judicially enforceable relief, which stand in contrast to relief obtained as a result of defendant's unilateral acts. *See id.* at 604.

This Court held:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

Id. at 605 (emphasis in original).

This Court surveyed its past holdings awarding attorney's fees where plaintiff obtained a judgment on the merits or a court-ordered consent decree, and its refusal to award fees where plaintiff failed to obtain any *judicial* relief on the merits but, instead, simply survived directed verdict or secured a judicial pronouncement – without any accompanying judicial relief – that defendant violated the Constitution. *See id.* at 605-606. This Court's focus as reflected in *Buckhannon* has been the judicial nature and court-ordered genesis of the relief obtained which in turn effectuates a change in the parties' legal relationship, not the timing, durability or preclusive effect of the judicial relief obtained. Thus, while *Buckhannon* recognized that "[n]ever have we awarded attorney's fees for a nonjudicial 'alteration of actual circumstances,'" the Court did not expressly hold that only judgments on the merits qualify a prevailing party. *Id.* at 606 (citation omitted).

And while prevailing parties do not include plaintiff "who, simply by filing a nonfrivolous but nonetheless potentially meritless lawsuit . . ., has reached the 'sought-after destination' without obtaining any judicial relief," nowhere in *Buckhannon* did this Court expressly require immunity from future suit as a condition to an award of fees. *Id.* (citation omitted). Instead, the test this Court established, by its terms, is broad enough to encompass interim judicial relief: "[A] 'prevailing party' is one who has been awarded some relief by the court." *Id.* at 603.

The concurring opinion in *Buckhannon* further emphasized the significance of a judicial determination in the lawsuit – or its equivalent, "the acknowledgment by the defendant – of the merits of plaintiff's case." *Id.* at 612-614 & n.2; *see also id.* at 615 ("prevailing party" is a term of art meaning "the party who wins the suit or obtains a finding (*or an admission*) of liability") (Scalia, J., concurring) (emphasis added). The question is whether some court-ordered relief is obtained in the lawsuit (as opposed to by virtue of a mere change in circumstances), not whether a fully litigated preclusive judgment is entered. *See id.* at 615-619.

More recently, in *Sole v. Wyner*, 551 U.S. 74 (2007), in considering whether a plaintiff who obtained preliminary injunctive relief was a prevailing party, this Court characterized the inquiry more broadly: "'The touchstone of the prevailing party inquiry,' this Court has stated, is 'the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.'" *Id.* at 82 (quoting *Texas State Teachers Ass'n v. Garland*

Independent School Dist., 489 U.S. 782, 792-793 (1989)); *see also Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (plaintiff must "receive at least some relief on the merits of his claims before he can be said to prevail"); *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (upholding fees based on consent decree and stating that "'parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.'") (citation omitted).

In *Sole*, this Court considered whether a plaintiff who obtained preliminary injunctive relief but then lost on the merits and suffered a judgment against her, qualifies as a prevailing party. This Court thus examined whether temporary interim court-ordered relief warrants an award of fees, where such relief is superseded by final judgment on the merits. *See Sole*, 551 U.S. at 81-86. This Court did not categorically reject the possibility that preliminary injunctive relief can confer prevailing party status, nor did it expressly require final preclusive judgment on the merits. Instead, this Court narrowly held that prevailing party status "does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision *in the same case*." *Id.* at 83 (emphasis added). In declining to confer prevailing party status, this Court emphasized the abbreviated and fleeting nature of the tentative interim relief plaintiff obtained, and noted the provisional relief would have no preclusive effect in the continuing litigation. Even so, this Court limited its ruling to preliminary injunctions that are reversed by judgment on the merits in the same action. *See id.* at 85-86.

This Court did not suggest that all preliminary relief is categorically insufficient, or that such relief must achieve preclusive effect not only in the continuing litigation but also in all future actions. To the contrary, this Court expressly declined to issue a *per se* rule regarding all interim relief and instead left open the possibility that preliminary injunctions obtained in the absence of a final decision on the merits may sometimes warrant an award of fees. *See id.* at 86 ("We express no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining preliminary injunction may sometimes warrant an award of counsel fees. We decide only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under § 1988(b) *if the merits of the case are ultimately decided against her.*") (emphasis added).

Preliminary injunction, by definition, is not a final judgment on the merits – or even, necessarily, an adjudication of the merits – and it is accorded no preclusive effect in the pending action or in future actions between the same parties.[2] Presumably, had

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[2] Under California law, which governs the preclusive effect of judgments obtained in this case, a preliminary injunction is not an adjudication on the merits and is accorded no *res judicata* or collateral estoppel effect in future litigation between the parties *See Gallo v Acuna,* 14 Cal 4th 1090, 1009 (1997) Thus, where plaintiff obtains preliminary injunction and the case is dismissed for mootness, *defendant remains at risk for future litigation on the same claims* (should they recur), and the previously obtained preliminary injunction has no preclusive effect in the second suit *See id*

this Court construed "prevailing party" as defined in *Buckhannon* to categorically preclude all interim judicial relief absent a final preclusive judgment it would have so held in *Sole*. Indeed, this Court has unanimously recognized that a plaintiff can be "prevailing party" without obtaining final relief on the "central issue in the suit." *Texas State Teachers*, 489 U.S. at 790. The question is whether there has been a "material alteration of the legal relationship of the parties." *Id.* at 792-793; *id.* at 791. That *Buckhannon* clarified such change must be court-ordered does not constitute a *per se* rule requiring defendants to obtain immunity from future suits [3]

Here, in requiring defendants to establish immunity from future suit, regardless of the interim and ultimate judicial relief obtained, the Ninth Circuit created a *per se* rule that contravenes the material alteration test as articulated by this Court. This Court has never expressly held that a final preclusive judgment on the merits – sufficient to achieve not only preclusive effect in the pending action but also *immunity from future suits* – is necessary before prevailing party status can be conferred. Such a rule requires defendants to litigate every case to finality – at the risk of an extorted settlement – while plaintiffs

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[3] *Buckhannon* approved *Parham v Southwestern Bell Tel Co.*, 433 F.2d 421, 427-429 (8th Cir. 1970), where plaintiff was deemed prevailing party and awarded fees when defendant changed its employment policies after a judicial finding of discrimination but absent an award of judicial relief. *See Buckhannon*, 532 U S at 616-617 & n.3 (fee award upon finding of discrimination but no judicial relief) (Scalia, J., concurring)

can obtain fees by securing temporary interim relief on a single claim. Here, the Trust achieved a judicially sanctioned alteration in the parties' relationship: it obtained court-ordered dismissal of the copyright claims, an admission of no liability, and an abandonment of all federal claims in the pending action. These judicial findings and the abandonment of federal claims were given preclusive effect in the pending action, and were never reversed, dissolved or undone. But for the subsequent voluntary dismissal, which rendered the action moot, the Trust would have achieved final preclusive judgment on the merits.

A rule that allows plaintiffs through subsequent voluntary dismissals to moot final judgment for the purpose of nullifying the preclusive effect of judicial findings cannot be squared with *Buckhannon* or *Sole*.

II. THE NINTH CIRCUIT'S *PER SE* RULE CONFLICTS WITH OTHER CIRCUITS THAT HAVE RECOGNIZED PREVAILING PARTY STATUS DOES NOT REQUIRE FINAL PRECLUSIVE JUDGMENT ON THE MERITS, AND THAT HAVE AWARDED FEES BASED ON INTERIM RELIEF

The Ninth Circuit's rule requiring immunity from future suit is tantamount to a rule requiring final judgment on the merits. But several circuits have expressly recognized that under *Buckhannon* dispositions other than final judgments on the merits can confer prevailing party status. More significantly, several circuits, including the Ninth Circuit, have conferred prevailing party status on plaintiffs who

obtain interim relief, even when plaintiff ultimately fails on the merits of the case, fails to obtain permanent relief, or the underlying claims are rendered moot.

The Second Circuit in *Vacchio v. Ashcroft*, 404 F.3d 663 (2d Cir. 2005), expressly rejected the contention that plaintiff is considered a prevailing party only if the court finally adjudicated the merits of plaintiff's claim In finding plaintiff the prevailing party, the Second Circuit found the material alteration test applies to "any interim judicial relief that alters the parties' legal relationship." *Id.* at 673. It stated:

> *Buckhannon* does not limit fee awards to enforceable judgments on the merits or to consent decrees. While these orders were cited by the Court as examples of the types of actions that would convey the judicial imprimatur necessary to a fee award, broader language in *Buckhannon* indicates that these examples are not an exclusive list.

Id. at 674 (quoting *Pres. Coalition v. Fed. Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004) (quoting *Buckhannon*, 532 U.S. at 604)). Applying this reasoning, the Second Circuit found plaintiff was a prevailing party for having obtained an interim order granting him release pending appeal, even absent preclusive final judgment on the merits, because the ruling "involved an assessment of the merits, [and] unquestionably materially altered the existing legal relationship between the parties." *Id.*

Previously, in *Roberson v. Giuliani*, 346 F.3d 75 (2d Cir. 2003), the Second Circuit expressly rejected a narrow reading of *Buckhannon* that would limit cognizable relief to final judgments on the merits:

> We therefore join the majority of courts to have considered the issue since *Buckhannon* in concluding that *judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees*, so long as such action carries with it sufficient judicial imprimatur.

Id. at 81-82 (collecting cases) (emphasis added); *see also Perez v. Westchester County Dep't of Corr.*, 587 F.3d 143, 150-151 (2d Cir. 2009) (rejecting contention that *Buckhannon* limited prevailing party status to final judgments on the merits, consent decrees or court-ordered settlements and stating: "Although the Supreme Court specifically mentioned merits decisions and consent decrees, *it did not suggest that one of these two conditions was necessary* for a party to prevail. Indeed, it referred to them as 'examples' of sufficient outcomes.") (emphasis added).

Indeed, the majority of circuits to have considered the issue have refused to construe *Buckhannon* as restricting prevailing party status to litigants who obtain final judgment on the merits. *See, e.g., Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008) ("Although an enforceable judgment on the merits and a court-ordered consent decree have sufficient judicial imprimatur, these examples are not

exclusive."); *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1085 & 2 (8th Cir. 2006) (noting open question whether court orders, such as declaratory judgments and preliminary injunctions, may create judicially sanctioned material alteration in parties' relationship); *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) (concluding, consistent with sister circuits, that "judicial action with sufficient judicial imprimatur other than a judgment on the merits or a court-ordered consent decree may allow for an award of attorney's fees."); *T.D. v. Lagrange School Dist.*, 349 F.3d 469, 478 (7th Cir. 2003) ("a litigant must have obtained a judgment on the merits, a consent decree, or some similar form of judicially sanctioned relief.");[4] *see also Bell v. Bd. of County Comm'rs of Jefferson County*, 451 F 3d 1097, 1103 (10th Cir. 2006) (private settlement agreements can qualify); *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 164 (3d Cir. 2002) (judicially enforceable settlements can suffice).

The Ninth Circuit, too, when considering prevailing plaintiffs, has repeatedly recognized that litigants can achieve prevailing party status without obtaining a judgment on the merits. The Ninth Circuit has expressly rejected overly narrow interpretations of *Buckhannon* and has held on numerous occasions that "judgments and consent decrees are examples . . . *but they are not the only examples*" of judicial action

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4 The Federal Circuit in an unpublished decision refused to find that defendant cannot prevail absent judgment on the merits *See Tavory v NTP, Inc*, 297 Fed. Appx 986, 990 & n 3 (Fed Cir 2008)

sufficient to convey prevailing party status. *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (emphasis added); *see also Carbonell v. INS*, 429 F.3d 894, 899 (9th Cir. 2005) (recognizing that litigants can prevail for purposes of fees "as a result of judicial action other than a judgment on the merits"); *Richard S. v. Dep't of Developmental Servs.*, 317 F.3d 1080, 1086 (9th Cir. 2003) ("prevailing party status is not determined by the degree of success achieved. . . . [it] is determined by inquiring whether the party's "'actual relief on the merits of [their] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'") (citation omitted); *Tipton-Whittingham v. City of L.A.*, 316 F.3d 1058, 1062 (9th Cir. 2003) (*Buckhannon's* examples of judgments and consent decrees are "illustrative, not exhaustive" types of relief capable of conferring prevailing party status).

More significantly, several circuits, including the Ninth Circuit, have conferred prevailing party status on plaintiffs who obtain preliminary or other interim relief, *even where plaintiff never succeeds in obtaining a final judgment* on, or adjudication of, the merits, and even where plaintiff's underlying claims and request for final relief are subsequently rendered moot by defendant's intervening actions. In such cases, the question is not whether plaintiff obtained a final preclusive judgment on the merits, which affords permanent relief and forecloses future actions. The question, rather, is whether the plaintiff obtained a merits-based judicially sanctioned material alteration in the parties' legal relationship for the *pertinent time*

period in the pending action during which the desired relief was sought and obtained.

In *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008), the Fifth Circuit, noting that this Court has not expressly defined the precise scope of the "judicial imprimatur" requirement, recognized that while "enforceable judgments on the merits and consent decrees are sufficient for prevailing party status," they are not necessary under *Buckhannon*. *Id.* at 521. Noting also that this Court has not decided whether preliminary injunctions in the absence of final judgment can confer prevailing party status, the Fifth Circuit declined to adopt a *per se* rule and instead considered a fact-specific standard. *See id.* at 521-523. The Fifth Circuit ultimately conferred prevailing party status on plaintiff who, in the absence of final adjudication on the merits, obtained preliminary injunctive relief that was subsequently rendered moot by defendant's accession to the prior court order.

The Fifth Circuit fashioned a three-part test and concluded that a merits-based preliminary injunction coupled with defendant's voluntary mooting of the action "in direct response" to the district court's order, which precluded final relief on the merits, "caused a material alteration in the legal relationship between the parties." *Id.* at 526. The Fifth Circuit concluded that *Buckhannon* embraces the possibility that interim judicial relief, including preliminary injunctions, may result in a court-ordered change in the parties' relationship, even in the absence of an admission or final adjudication of liability. *See id.* Rejecting the contention that defendant's post-order, prejudgment

voluntary change in behavior precluded plaintiff's prevailing party status, the Fifth Circuit stated: "*Buckhannon* does not stand for the proposition that a defendant should be allowed to moot an action to avoid the payment of the plaintiff's attorney's fees when a district court grants a preliminary injunction based upon an unambiguous indication of probable success on the merits." *Id.* at 524. Thus, where interim relief is obtained upon a judicial assessment of the merits, and final relief is mooted after the judicial determination is made, prevailing party status can be conferred.[5]

The Third Circuit in *People Against Police Violence v. NAACP*, 520 F.3d 226 (3d Cir. 2008), applied similar reasoning to reach the same result. Noting that this Court left open the possibility that temporary interim relief can confer prevailing party status, the Third Circuit expressly stated that "litigation need not progress to a final judgment on the merits" for a fee award to be proper under *Buckhannon*. *Id.* at 232. The Third Circuit joined its sister circuits to conclude that relief on the merits in the form of a provisional preliminary injunction can confer prevailing party status even if final judgment is never reached. *See id.* at 232-234 & n.4 (collecting cases). The Third Circuit rejected the contention that defendant's post-injunction voluntary consent to the relief precluded fees because defendant acquiesced

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5 The Fifth Circuit emphasized that defendant's mooting of the action in direct response to the interim order should be construed as acquiescence in determining prevailing party status *See id* at n 3.

after it opposed judicial relief, and its requests for dismissal were denied. *See id.* at 234-235.

The Second, Sixth, Seventh and District of Columbia Circuits are in accord, and have recognized that preliminary interim judicial relief, even absent final preclusive adjudication on the merits, can confer prevailing party status. These circuits reject a *per se* rule and instead consider the facts and circumstances surrounding the interim order to determine whether *Buckhannon* has been satisfied. *See, e.g., Dupuy v. Samuels*, 423 F.3d 714, 723-724 & n.4 (7th Cir. 2005) (rejecting *per se* rule that preliminary injunction can never serve as predicate for interim fee award); *Vacchio*, 404 F.3d at 672-674 (rejecting *per se* rule that interim stay or preliminary injunction absent final judgment requires automatic denial of fees); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945-946 (D.C. Cir. 2005) (rejecting contention that *Buckhannon* established *per se* rule that preliminary injunction can never warrant prevailing party fees and adopting case-by-case test); *Dubuc v. Green Oak Township Zoning Bd. of Appeals*, 312 F.3d 736, 753-754 (6th Cir. 2002) (noting preliminary injunction can qualify if based on "'an unambiguous indication of probable success on the merits, and not merely a maintenance of the status quo ordered because [of] the balance of equities'") (citation omitted);[6] *see also N. Cheyenne Tribe*, 433 F.3d at 1086

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[6] The Eleventh Circuit in an unpublished decision found that merits-based preliminary injunctions warrant fees. *See Wyner v Struhs*, 179 Fed Appx 566 (11th Cir 2006), *rev'd on other grounds, Sole v Wyner*, 551 U.S 74 (2007)

(suggesting that some merits-based preliminary relief could confer prevailing party status); *cf. Smyth v. Rivero*, 282 F.3d 268, 275-277 & nn.8-9 (4th Cir. 2002).

The Ninth Circuit has adopted a generous approach when considering whether plaintiffs who obtain interim relief but fail to secure final preclusive judgment on the merits are prevailing parties, stating that a "preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buckhannon*." *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002). The Ninth Circuit holds that plaintiffs who win preliminary relief are prevailing parties notwithstanding the subsequent mooting of their actions and failure to obtain final relief. So long as interim relief is mooted, and not reversed, prevailing party status can be conferred. *See id.* The Ninth Circuit does not require preclusive judgments for plaintiffs, nor a merits-based ruling. The relevant inquiry is whether the interim order materially altered the parties' legal relationship for the "pertinent time period" during the pending action. *Id.* at 1095 (citation omitted); *id.* at 1093 (plaintiff who obtains preliminary injunction prevails "even though he did not recover any other relief"); *Richard S.*, 317 F.3d at 1088-1089 (rejecting that preliminary injunction issued to preserve status quo without assessment of merits cannot confer prevailing party status).

The Ninth Circuit has extended this rule to confer prevailing party status on a plaintiff who obtained an interim stipulated 45-day stay from deportation, and thus achieved the desired result for the pertinent time period – notwithstanding that he

was under a final deportation order and failed to obtain any affirmative relief in the underlying action. *See Carbonell*, 429 F.3d at 899-902 (citing *Rueda-Menicucci v. INS*, 132 F.3d 493, 495 (9th Cir. 1997) (plaintiff prevails upon securing remand without adjudication of merits or grant of affirmative relief)); *cf. Vacchio*, 404 F.3d 663 (stays, injunctions and "any interim judicial relief that alters the parties' legal relationship" can confer status if governed by assessment of merits).

These cases demonstrate that circuit courts uniformly confer prevailing party status on plaintiffs who obtain interim relief without securing a final preclusive judgment. By definition, preliminary injunctions and stays are not preclusive in the pending action and are accorded no preclusive effect in future actions between the parties. Preliminary relief cannot immunize plaintiffs from the risk of future suits, nor foreclose the possibility that defendants will re-commence the offending conduct and invite a second action. Yet, plaintiffs are not required to obtain preclusive judgments as a condition of awarding fees Circuit courts confer prevailing party status not because plaintiffs obtain a preclusive final judgment on the merits, but, rather, because they obtain a judicially sanctioned change in the parties' legal relationship for the *pertinent time period during the pending action.*

In categorically requiring defendants to obtain immunity from future suit by securing preclusive final judgments, while plaintiffs prevail by obtaining non-preclusive temporary relief, the Ninth Circuit has created a profound and irreconcilable doctrinal conflict among the circuits, and a disparate double standard for

defendants, which cannot be justified by *Buckhannon*. Where, as here, a defendant who obtains successive judicial dismissals, an irrevocable and unequivocal express abandonment of federal claims and accession to imminent dismissal with prejudice through voluntary termination of the action has undoubtedly secured a judicially sanctioned change in the parties' legal relationship. Whether or not the failure to replead federal claims "carries over" to a second action, it is beyond dispute that intentionally abandoned claims cannot be resurrected in the pending action. *See e.g.*, *Marx v. Loral Corp.*, 87 F.3d 1049, 1055-1056 (9th Cir. 1996) ("'Ninth Circuit authority clearly states that all causes of action . . . not alleged in an amended complaint are waived.'"). This Court has never held that plaintiffs can unilaterally nullify the effect of an intentional abandonment of claims in a pending action through voluntary dismissal (and resurrection in a second action) for the express purpose defeating prevailing party status. Yet, this is precisely the rule the Ninth Circuit has embraced. The Ninth Circuit's rule thus turns *Buckhannon* on its head, as it empowers plaintiffs to unilaterally determine by mooting their own actions whether interim orders will be given preclusive effect and prevailing party status conferred.

In fashioning its *per se* rule, the Ninth Circuit relied on circuit decisions that have characterized dismissals without prejudice as non-final, and have refused to confer prevailing party status as a result. However, none of the cited cases stands for the proposition that plaintiff's subsequent voluntary dismissal can be used as a device to nullify prior

judicial orders, resurrect abandoned claims or supersede binding merits-based findings or admissions. None of the cases involved successive orders of judicial dismissal *prior* to voluntary dismissal over the course of protracted litigation, interim assessments of the merits, binding judicial admissions, or pre-dismissal abandonment of federal claims.[7] *See, e.g., Oscar v. Alaska Dep't of Ed. & Early Devel.*, 541 F.3d 978, 981-982 (9th Cir. 2008) (motion to dismiss granted without prejudice for failure to sign complaint; no voluntary dismissal entered); *Torres-Negron v. J & N. Records, LLC*, 504 F.3d 151, 164-165 (1st Cir. 2007) (dismissal for lack of subject matter jurisdiction not decision on merits absent ruling on copyright infringement claims); *RFR Indus., Inc. v. Century Steps, Inc.*, 477 F.3d 1348, 1353 (Fed. Cir. 2007) (voluntary dismissal deemed entered before ruling for defendant); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1075-1077 (7th Cir. 1987) (voluntary dismissal filed before court ruled).

Extending these decisions to create a *per se* rule effectuates a substantial expansion of existing circuit law and places civil defendants at a profound disadvantage. Review is warranted to clarify whether

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[7] Decisions finding dismissal with prejudice sufficient to award fees are inapposite *See, e g , Riviera Distrib., Inc v Jones*, 517 F 3d 926 (7th Cir 2008) (dismissal with prejudice satisfies *Buckhannon*, even absent adjudication of merits), *cf Miles v. California*, 329 F 3d 986, 989 (9th Cir 2003) (dismissal without prejudice sufficient where federal claim foreclosed). That preclusive final judgment is sufficient to confer prevailing party status does not make it necessary

Buckhannon requires preclusive judgments and immunity from suit, reconcile the disparate standards for plaintiffs and defendants the Ninth Circuit created, and ensure uniformity among the lower federal courts.

III. THIS CASE RAISES A QUESTION OF EXCEPTIONAL IMPORTANCE ON AN ISSUE OF FEDERAL LAW THAT WARRANTS REVIEW

This Court has never held that a prevailing litigant must achieve immunity from future suit in order to qualify for prevailing party status. A *per se* rule requiring that defendants obtain immunity from future suit, notwithstanding a material alteration of the parties' legal relationship in the pending action, is tantamount to requiring defendants to obtain an enforceable judgment on the merits. Such a categorical rule, however, has been expressly and repeatedly rejected by several circuit courts, and by this Court. Indeed, a rule that allows plaintiffs to deprive defendants of prevailing party status by voluntarily dismissing their actions after defendants have obtained significant judicial relief fundamentally undermines *Buckhannon*, which rejected the idea that parties through their own actions could confer prevailing party status. In essence, this rule permits plaintiffs to unilaterally nullify a prior material alteration of the parties' legal relationship by withdrawing their claims in the face of imminent judicial action, and to annul the impact of interim judicial orders by dismissing at the eleventh hour.

This new rule, that "a defendant is a prevailing party following dismissal of a claim if the plaintiff is judicially precluded from relitigating the claim against the defendant in federal court," applies with equal force not only to Copyright Act actions, but to all fee awards governed by *Buckhannon* and, thus, affects the construction of numerous federal statutes and litigants throughout the federal courts. *See, e.g.*, *Ma v. Chertoff*, 547 F.3d 342, 344 (2d Cir. 2008).

The Ninth Circuit's rule creates disparate standards for determining prevailing party status for plaintiffs and defendants. In the Ninth Circuit, prevailing defendants are required to establish immunity from future lawsuits by obtaining relief with preclusive effect. In contrast, prevailing plaintiffs are not required to obtain preclusive relief or foreclose the risk of future litigation. Rather, plaintiffs are entitled to prevailing party status upon obtaining interim relief (which, by definition, has no preclusive effect), whether or not they ultimately prevail on the merits of the underlying claims and whether or not defendant's conduct renders the action moot. Such disparate treatment cannot be justified by *Buckhannon* and contravenes the unique nature of the Copyright Act's symmetrical fee-shifting provision. This Court has directed that parties in a copyright action must be treated symmetrically; thus, unlike other fee-shifting statutes that favor plaintiffs, "prevailing plaintiffs and prevailing defendants are to be treated alike" under the Copyright Act. *Fogerty v. Fantasy*, 510 U.S. 517, 534 (1994); *see also Eagle Serv. Corp. v. H20 Indus. Serv., Inc.*, 532 F.3d 620, 624 (7th Cir. 2008) (because

prevailing defendants receive a small award or no award, the presumption in favor of awarding fees under *Fogerty* is "very strong").

Even assuming immunity from suit is required by *Buckhannon* and permitted by *Fogerty*, it is simply not true that an abandonment of claims and dismissal without prejudice leave the situation "'as if the action never had been filed.'" Pet. App. 16a (citing *City of S. Pasadena v. Mineta*, 284 F.3d 1154 (9th Cir. 2002)). The filing of a case that is subsequently dismissed does have lasting effects. While cases voluntarily dismissed without prejudice normally do not have collateral estoppel or preclusive effect, they indisputably do affect the relationship of the parties. For example, party allegations constitute judicial admissions, even in a subsequent action. *See, e.g., American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("Under federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court."); *Ins. Co. of N. Am. v. Thompson*, 318 F.2d 677, 682 (9th Cir. 1967); *Adams v. Teck Cominco Alaska, Inc.*, 414 F. Supp. 2d 925 (D. Alaska 2006). Voluntarily dismissed claims can result in an award of sanctions, including costs or even fees. *See Cooter & Gell v. Hartmax Corp.*, 496 U.S. 382, 395-96 (1990) (recognizing power to impose Rule 11 sanctions after action is no longer pending, even after voluntary dismissal).

Dismissals without prejudice can be "final" where the court conclusively disposed of the claims and determined that the complaint could not be saved by amendment, or where the statute of limitations bars

future suit. *See, e.g., Doctor's Assocs. v. Duree*, 375 F.3d 618, 622 (7th Cir. 2004). Previously abandoned claims can be barred by judicial estoppel or the law of the case doctrine. *See, e.g., Sechrest v. Ignacio*, 549 F.3d 789, 805 (9th Cir. 2008); *Thomas v. Bible*, 983 F 2d 152, 154 (9th Cir. 1993). Under California law, a voluntary dismissal, *even one without prejudice*, is presumed to be a favorable termination on the merits for purposes of establishing malicious prosecution. *See MacDonald v. Joslyn*, 275 Cal. App. 2d 282, 289 (1969); *Sycamore Ridge Apartments LLC v. Naumann*, 157 Cal. App. 4th 1385, 1400 (2007).

In these respects, the parties are not left as though the case had never been filed. The Ninth Circuit stretched *City of South Pasadena* too far when it took that case as authority for the proposition that abandoned claims can be resurrected in subsequent suits by filing a voluntary dismissal in the first action.[8] Even where a second action is not barred by *res judicata*, plaintiff's express abandonment of a claim, which is obtained as a direct result of the district court's orders of dismissal, and which occurs prior to

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[8] *City of South Pasadena* did not involve or address whether a voluntarily abandoned claim can be resurrected in a subsequent lawsuit and did not disapprove or criticize the strong, express line of cases establishing abandonment by failure to replead. The court there concluded that a waiver of sovereign immunity in an action that was voluntarily dismissed does not constitute consent to be sued in a new action on a new claim 25 years later - it did not purport to create a *per se* rule permitting plaintiffs to resurrect claims they intentionally abandoned

the dismissal of the federal action, materially alters the parties' legal relationship during the pending action.

The Ninth Circuit's departure from existing precedent to create a *per se* rule fundamentally undermines the purpose of Section 505 and effectively precludes defendants from establishing prevailing party status in cases where plaintiffs unilaterally moot final judgment. Such a blanket rule – which applies to all voluntary dismissals without regard to the stage of litigation, intentional waivers or interim judicial orders – creates a disparate standard for civil defendants, fundamentally undercuts *Buckhannon*, encourages abusive tactics and effectively requires prevailing defendants to disprove plaintiffs' claims.

CONCLUSION

For the reasons above, the petition should be granted.

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Respectfully submitted,

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